CHAPTER III

THE LAW ON DRUGS

The statutory provisions regulating the law on dangerous drugs in West Malaysia are found in the Dangerous Drugs Ordinance, 1952 (No. 30 of 1952) and the regulations thereunder: Dangerous Drugs Regulations (L.N. 555 of 1952). Other laws which are of marginal importance are the Poisons Ordinance, 1952 (No. 29 of 1952), The Sale of Food and Drugs Ordinance, 1952 (No. 28 of 1952), The Penal Code (F.M.S. Cap 45) and The Road Traffic Ordinance, 1958. In this Chapter it is proposed to discuss the various offences created by these statutes particularly those created by the Dangerous Drugs Ordinance, 1952, (hereinafter referred to as the Ordinance, unless expressly stated otherwise). It is also hoped to see how the law has been interpreted and applied by the courts.

Before discussing the various offences created by the Dangerous Drugs Ordinance, it is necessary to note that where the wording of a section indicates an absolute prohibition, it is unnecessary for the prosecution to prove mens rea in order to secure a conviction under the section. This can be seen in the case of Lim Eng Soon v P.P.[28] This was an appeal against conviction of the appellant under section 4(1) of the Dangerous Drugs Ordinance 1952. The question raised on appeal was whether

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28. [1953] 19 MLJ 166

the wording of the section indicated an absolute provision or whether it was necessary for the prosecution to prove mens rea to secure a conviction. The provisions of section 4(1) of the Ordinance was held to amount to an absolute provision of the import of raw opium and therefore it is unnecessary for the prosecution to prove mens rea or knowledge. Storr, J. remarked in his judgement that

> " .... lack of knowledge is no answer to the charge but is a matter for mitigation of the sentence ...."

Examples of provisions in the Dangerous Drugs Ordinance which indicates an absolute prohibition are sections 4(1), 5(1) and 6B(1) in Part II, section 9(1) in Part III, section 12(1) and subsection (2) in Part IV, sections 19(2), 20(3), 21(1), 22(1) and 24(1) in Part V and section 39B(1) in Part VI.

In any offences of attempting to commit any of the offenses, the prosecution need not also prove mens rea in order to secure a conviction. In the case of Tan Wang Kong v. P.P. [29] the appellant was convicted for attempting to export raw opium contrary to sections 33 and 5(1) of the Dangerous Drugs Ordinance and punishable under section 5(3) of the Ordinance.

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29. [1962] 28 MLJ 47

It was argued for the appellant on appeal that he was unaware of the existence of opium in his car and as such he could not be guilty of the offence charged because mens rea is a necessary element to the commission of an attempt to commit an offence. Adams, J. in the course of his judgement declared:

> "The definition of a attempt to commit a crime in Stroud's Judicial Dictionary, 3rd Edn. is 'An act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted.' In other words ' ... a man cannot attempt to do what he does not intend, if he is able, to do.' (Russel on Crimes, 11th Edn., 188). But all these references refer to a crime in the normal meaning of the word where there must be actus rea and mens rea before it can be committed. The offence with which we are dealing is a statutory offence created for the general benefit of mankind in an attempt to halt the unrestricted import and export of dangerous drugs ... I see nothing illogical in holding that where there is an absolute provision against the doing of an act, there may also be an absolute prohibition against the making of an attempt and that a purely involuntary attempt is an offence ..." 30

The appellant was therefore found guilty of attempting to export opium even if he did not know the opium was in his car.

Possessory Offences

Possessory offences are very important in the Dangerous Drugs Ordinance and form most of the reports relating to drug

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30. [1962] 28 MLJ 47, at pg. 48.

cases in the Malayan Law Journal. They may be divided into two categories. Firstly, there is the offence of possessing dangerous drugs under sections 6, 9(1)(b) and 12(2). Secondly, there is the offence of possessing any pipe or other utensil for use in connection with the smoking of prepared opium or any utensils used in the preparation of opium for smoking or consumption contrary to section 10(2)(a). It is curious to note that in Part IV of the Ordinance, possession of any syringe or other utensil used in administration of dangerous drugs to which that Part applies [31] is not made an offence as in section 10(2)(a) of Part III. However, possession of such utensils shall only give rise to a presumption that the premise in which they were found were used for purposes for administration or the smoking or consumption of a dangerous drug. This is provided by section 37(e).

The term "possession" have often caused difficulty. However, we can look at case law to assist us in the determination of its legal implications. In the Singapore case of Toh Ah Lok & Mak Thim v. Rex [32], Gordon-Smith, Ag. C.J., stated that,

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31. See: Section 11 of the Ordinance.

32. [1949] 15 MLJ 54.

> " .... Possession in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him the power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal ....." [33]

In that case, the accused was charged under section 3 of the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946. We are concerned there only with the dicta of Gordon-Smith, Ag. C.J.

We can see from this definition that knowledge of the nature and control of the thing possessed are an essential ingredient of "possession". However, we must be careful in applying this definition in other areas, such as our drug legislation, where the fact of possession itself constitutes an offence. Our Ordinance provides in section 37(d) that

> " any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

Section 37(d) clearly states that if anything whatsoever is found to be in the custody or under the control of the person, two things shall be presumed in law until the contrary is proved. Firstly, that person shall be deemed to be in

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33. Ibid, at page 55.

possession of such drug and secondly, he shall be deemed to have known the nature of such drug. That section can be divided into two limbs and it works in two stages. First, the prosecution must prove beyond reasonable doubt that the accused had either in his "custody" or under his "control" anything whatsoever containing dangerous drug. Once this is done, the second limb operates and the burden of proof shifts to the accused who must prove on the balance of probabilities that he was not in possession of the dangerous drug or that he knew the nature of such drug.

The law on the respective evidential burden of the prosecution and of the accused in rebutting such a statutory presumption has been settled in Malaysia by the Privy Council in the case of D.P.P. v. Yuvaraj [34]. The case was referred to the Privy Council by the Federal Court on a point of law relating to the burden of proof under The Prevention of Corruption Act, 1961. [35] The respondent was charged under section 4(a) of the Act and the question referred to the Privy Council was regarding the burden of proof on the respondent to discharge a presumption having been raised against him under section 14 of the Act.

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34. [1970] A.C. 913.

35. (No. 42 of 1961).

The Privy Council held that generally, no onus laid upon any accused of proving any fact and it was sufficient for his acquittal if any of the facts, if they existed, would constitute the offence with which he was charged, were "not proved" [36]. But where as in the present case, an enactment creating an offence expressly provided that, if other facts were proved, a particular fact, the existence of which was a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved", the consequence of finding that that particular fact was "disproved" [37] would be an acquittal, the burden of rebutting such a presumption is on a balance of probability as that applied in civil proceedings. This applies fully to all the other presumptions laid down in section 37 and other provisions of the Dangerous Drugs Ordinance, 1952 (for example section 6B(4) of the Ordinance).

It would appear on first reading of section 37(d) of the Ordinance that the requirement of mens rea has been dispensed with making possession of dangerous drugs a strict liability offence. It is submitted that this is not the case. The requirement of mens rea is still present but the onus of proof shifts from the prosecution, once the prosecution proves the

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36. See: Section 2 of the Evidence Act, 1950.

37. Ibid.

first limb, to the defendant who then has to disprove a guilty mind. Section 37(d) can be seen as a deliberate attempt by the legislature to modify the ordinary legal meaning of "possession".

It is doubtful whether the dictum of Gordon-Smith, Ag. C.J. referred to earlier is applicable to possessory offences under the Dangerous Drugs Ordinance without qualification. This was the subject of comment by Taylor, J. in the case of Leow Nghee Lim v Reg.[38] His Lordship stated:

> " .... I must, however, comment on the misuse which have been made of the dictum in Mak Thim. There the Court specified certain characteristics without which, they said (except by statute) possession cannot be criminal. The words in brackets are vital. They were deliberately inserted to show that the ruling is not applicable where the meaning of the word 'possession' is controlled by the particular statute ...".[39]

We have next to determine what is meant by "custody" and "control" in subsection (d) of section 37. These questions arose in the case of Leow Nghee Lim v Reg.[40] This was an appeal from the conviction of the appellant on a charge of possession of prepared opium under section 9 of the Dangerous Drugs Ordinance. The facts briefly were that the police raided a

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38. [1956] 22 MLJ 28.

39. Ibid, at page 30. Emphasis added.

40. [1956] 22 MLJ 28.

coffeeshop owned by the appellant and in a drawer of the counter found a cigarette tin containing 9 small packets of prepared opium. No pipes or other utensils were found. The drawer was not locked and 15 small books were found in it in which sales to credit customers were entered and other articles indicating that the appellant and his assistants all had access to the drawer. The Learned Magistrate convicted the appellant of possession of the opium.

On appeal, Taylor, J. held that the circumstances of the case showed that the appellant's assistants also had access to the drawer in which the tin of opium was found and the quantity of the opium was small. These showed that possession by the appellant was equally consistant with the possession being that of one of the assistants. Thus, the provisions in section 37(d) did not operate and the appeal was allowed. However, Taylor, J. observed that the facts were sufficient to raise an inference that the accused abetted the possession by an assistant and that the accused should have been recharged in the alternative with either possession or abetment.

In the course of his judgement, Taylor, J. explained the meaning of "custody" and "control" within section 37(d) of the Ordinance. His Lordship stated:

> ".... The Magistrate says that if the opium was concealed in the drawer with the knowledge of the accused, it follows that he has custody of it. I question this proposition ... There is no presumption of custody. The presumption is from custody. Unless custody is established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession ....." 41

Thus, what the prosecution has to prove when invoking section 37(d) is that the accused has either the custody or control of the drug. The necessary knowledge required to be proved by the prosecution is that the accused knows the existence or whereabouts of the drugs or anything containing drugs. Once this is proved, the knowledge of the nature of the drugs which is a necessary ingredient of "possession" will be presumed and the onus is on the accused to rebut this presumption on the balance of probabilities.

The question now is when does the presumption of possession in section 37(d) arise. We can determine this by looking at decided cases on the point. In Choo Teck Soon v P.P., [42] a tin containing opium was found in a luggage of a motorcar owned

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41. Ibid, at page 30. Emphasis added.

42. [1954] 20 MLJ 63.

by the appellant. On being questioned by the Inspector as to what was inside the tin, the appellant was alleged to have replied chandu. The learned President considered whether there was a presumption against the a appellant under paragraphs (d) or (g) of section 37 of the Ordinance. But he did not feel that it was necessary to come to a conclusion, presumably because of the admission in the evidence of the statement of the appellant. The appellant who was convicted, appealed.

On appeal, Wilson, J. in allowing the appeal held that the statement of the appellant was inadmissable under section 113(iii) of the Criminal Procedure Code and section 27 of the Evidence Ordinance, 1950 did not apply. He also held that there can be no presumption under section 37(g) of the Ordinance because a car does not constitute premises within the meaning of the Ordinance.

However, on the presumption of possession under section 37(d), Wilson, J. held on the authority of the Singapore case of Ho Seng Seng v Rex, [43] that the presumption can only arise after it has been proved that the appellant knew the contents of the tin. His Lordship stated:

> " ... In my opinion, in this case under appeal, the onus was on the prosecution to show that the appellant knew what was in the tin found in his motorcar ..." [44]

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43. [1951] 17 MLJ 225.

44. [1954] 20 MLJ 63 at page 64.

With due respects, the writer disagree with this statement of the law. The onus on the prosecution in that case should be only to prove that the tin containing opium was either in the custody or under the control of the appellant. Section 37(d) clearly states " ... anything whatsoever containing dangerous drugs ..." Onece this is done, the appellant shall be deemed by that section to have known the nature of such drug. The prosecution is not bound to prove that the appellant knew the tin contained opium. The onus is on the appellant then to rebut the presumption that he has knowledge of the opium in the tin, or that he was in possession of it.

However, the decision of Wilson, J. in Choo Teck Soon v P.P.[45] can be justified on the facts. The boot of the car was not locked and the search was made on information received from some informer. There was no evidence that the tin was in the car when it was parked and anybody could have planted the chandu in the car during the night. On these facts it is doubtful whether the prosecution can prove that the appellant had the custody or control of the tin containing the opium.

The Singapore case of Ho Seng Seng v Rex on which Wilson, J. relied in his decision in Choo Teck Soon v P.P. was held to

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45. [1954] 20 MLJ 63

be not an authority in the Federation of Malaya by Thompson, J. in the case of P.P. v Ong Chang Sow.[46] In Ho Seng Seng's case, the Court was concerned with section 37(d) of the Singapore Dangerous Drugs Ordinance, 1951 which is similar to section 37(d) of the Federation's Ordinance except for the exclusion of " ... anything whatsoever containing ..." prior to the words " ... any dangerous drug ..." in the Singapore Ordinance. This makes the Malaysian provision wider than that of Singapore in the sense that the prosecution need only to prove that the accused was in possession of any container, receptacle, etc. containing dangerous drugs in order to invoke the presumptions contained in section 37(d) of the Ordinance.

We can see this clearly in the case of P.P. v. Ong Chang Sow itself. In that case, a party of Customs officers raided the respondent's house and found under a bed a locked box which was later found to contain opium. The key to this box was in the possession of the respondent's neighbour. At the close of the prosecution case, the learned President acquitted and discharged the respondent as he found that the respondent had no case to answer on a charge under section 6 of the Ordinance. He relied on the Singapore case of Ho Seng Seng v Rex and held that the prosecution had not discharged the onus of showing that the respondent knew that the box contained opium.

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46. [1954] 20 MLJ 82

On appeal, Thompson, J. held that the Singapore case relied upon was no authority in the Federation because of the different wordings of the two respective Ordinance. Section 37(d) of the Dangerous Drugs Ordinance, 1952 raises a presumption that a person is in possession of a drug and knows the nature of such drug if he is found to have in his custody or control anything whatsoever containing the dangerous drug and therefore the learned President was wrong in holding in that case that there was no prima facie case against the accused.

P.P. V Tang Chew Meng [47] is an interesting case relating to the presumption of possession. In that case, a police party in the course of a search of the night mail train from Penang found two bags containing opium which were in the sleeping berth occupied by the accused on the train. The accused was found sleeping in the berth. The learned President of the Sessions Court acquitted the accused at the close of the prosecution case without calling on his defence. The Public Prosecutor appealed.

In the High Court, Chang Min Tat, J. allowed the appeal and held that the learned President was wrong in holding that a person otherwise in custody or possession loses awareness of the custody when he is asleep and in that case, the accused

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47. [1969] 2 MLJ 17

should have been called upon to enter on his defence since the presumption under section 37(d) had arisen.

In the grounds of decision of the lower court, the learned President had stated, inter alia,

> " ... It was no doubt presumable that being found in the possession the accused must be a possessor of the two bags but since these two bags were found there while the accused was fast asleep it was also presumbale that someone else might have placed these two bags there without the knowledge of the accused ... As far as I am aware of, there is no law to say or presume that a sleeping man is conscious of anything at all ..."

Chang Min Tat, J. in the course of his judgement stated:

> " ... In my view, (this) argument is fallacious. Carried to its logical conclusion, it would involve that in a case of a person who was wide awake and was in such proximity and in such circumstances to dangerous drug as to lead otherwise to a reasonable inference of custody or possession within the meaning of the Ordinance, the prosecution would have to prove that at the moment of detection that person was consciously and actively aware of his custody or possession. In other words, mental absenteeism at the pertinent time was sufficient as a defence. To say that a person otherwise in custody or possession loses awareness of his custody or possession when he falls asleep, is, in my opinion, and with respect, to misunderstand or to misinterprete the physiological relationship between sleep and consciousness ..." [48]

To the suggestion that the bags of opium could have been placed next to the accused while he was sleeping, the judge

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48. [1969] 2 MLJ 17 at page 18.

held that in the absence of any evidence of any one nearby having access to the sleeping berth, it would be a defence for the accused to put up and not to be anticipated by the trial President. This decision, it is submitted is fully supported by the case law on section 37(d) though this section was not specifically mentioned in the judgement. Once the learned President finds that the bags were in the custody of the accused, the presumption of possession in section 37(d) operates against the accused and the burden shifts to the accused to rebut the presumption.

However, where the prosecution have not adduced evidence that the accused is in custody or in control of the dangerous drug or anything containing dangerous drug, the presumption in section 37(d) will not operate. This can be seen in the case of P.P. v Lai Ah Bee.[49] In this case, the accused who was charged under section 12(2) of the Dangerous Drugs Ordinance was found in a room in a house under the raised platform floor of which were found three tins of opium lying on the ground. Access to the location of the tin can only be through the outside by crawling under the house. The Public Prosecutor relied inter alia, on the presumption in section 37(d). The

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49. [1974] 2 MLJ 74.

court held inter alia, that once the three tins were found under the floor board and access was possible only from outside, the presumption in section 37(d) was not raised against the accused.

It should be noted that proof of possession is a very essential ingredient of possessory offences under the Dangerous Drugs Ordinance. Where the accused pleaded guilty to some charges of possessory offences under the Dangerous Drugs Ordinance but in mitigation states that the exhibits were not his but were left behind by a friend, his plea cannot stand and there must be a retrial. This was so held in the case of Heng Kim Khoon v P.P. [50] by Sharma, J. His Lordship stated in the course of his judgement that:

> " ... A plea of guilty may be accepted by the court and the accused convicted on it but the court is not bound to accept a plea of guilty in all cases. The court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakable terms with full appreciation of the essential ingredients of the offence. This rule of law is applied with all the greatest stringency when the offence charged is complicated or serious ... In the instant case, the question of possession was involved which can sometimes be a very difficult question ..." [51]

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50. [1972] 1 MLJ 31

51. [1974] 1 MLJ 30, at page 31.

In order to rebut a presumption raised against a person charged under the Dangerous Drugs Ordinance, the accused need not necessarily rely on defence evidence alone. The presumption may be rebutted by circumstances appearing in the prosecution evidence. This can be seen in the case of Leow Nghee Lim v. Reg [52] mentioned earlier. In that case the prosecution evidence showed that the accused and his assistants had joint control of the drawer in which the tin containing opium was found. Also, it was proved that the amount of opium was small. These circumstances show that possession by the accused was also consistant with possession being that of one of the assistants. Thus, the presumption in section 37(d) if it was raised against the accused was rebutted.

It can be seen in conclusion, that the Malaysian provisions relating to possessory offences by virtue of section 37(d) are much wider than that of the Singapore counterpart. [53] In view of the nature of possessory offences relating to dangerous drugs, this is most apt. It is very difficult to investigate and trace drugs held by both the addicts and the traffickers since everythign done by those involved are done secretly and they take pains to cover their tracks. Once drugs are traced on a person, it is, on one hand difficult to prove

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52. [1956] 22 MLJ 28

53. See: P.P. v Ong Chang Sow [1954] 20 MLJ 82.

"possession" in the ordinary legal sense and on the other hand, it is easy to raise the defence of ignorance. The law as it stands, put pressure upon every member of the public to order their affairs to ensure that there is absolutely no possession of dangerous drug other than those authorised by law. Should there be in his custody or in his control any dangerous drug or anything containing dangerous drug, the onus is on him to rebut the presumption of possession and knowledge of it.

The arguments against such an onerous rule of law can be outweighed by the urgent necessity of eradicating our society of this grave social evil of drug abuse through effective laws.

As far as provisions relating to possessory offences in the Dangerous Drugs Ordinance are concerned, there should be a provision relating to "constructive possession". Such a provision is present in section 2(2) of the Hong Kong's Dangerous Drugs Ordinance, 1968.[54] The relevant words are:

> " ... A person shall be deemed to be in possession of a dangerous drug ... if it is ... held by some other person subject to him control or for him and on his behalf ..."

This is important in attaching liability on persons who employ agents or carriers in trafficking, distributing and

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54. (Cap. 134 L.H.K. 1968)

pushing dangerous drugs. It is well known to the enforcement agencies that the kingpins of drug trafficking can never be found with physical possession of dangerous drugs. All the actual physical handling, transportation and distribution are done by their servants or agents. There is a very strong case for such a provision in Malaysia since as the law stands, these kingpins can easily operate their drug business through their servants and agents. This is what is in fact being done now. Should these servants or agents be caught, the law cannot proceed further than these carriers and attach liability on their principals. It is these kingpins that need to be rooted out most and punished for they are the brains and financiers behind drug traffickers.

OTHER OFFENCES

(a) Trafficking in dangerous drugs.

Prior to the incorporation of section 39B to the Dangerous Drugs Ordinance by the Dangerous Drug (Amendment) Act, 1975,[55] there is no single offence of trafficking as such. The only provisions that was then nearest to the general

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55. Act A293/75.

concept of dealing in or distributing dangerous drgus is section 9(1)(c) in Part III which prohibits any person from manufacturing, selling or dealing in any prepared opium. It is interesting to note that there is no similar provision in Part II or Part IV of the Ordinance. It would seem that the legislature has taken a long time before realising the importance of trafficking in Dangerous Drugs of all types.

Subsection (2) of section 39B provides the punishment of death or the alternative of life imprisonment which includes the mandatory punishment of whipping on conviction. This is the most severe penalty provided by the Ordinance. It also drastically restricts courts' discretion with regards to sentence for any offence under that section.

"Trafficking" is defined by section 2 of the Ordinance as follows :

> " Trafficking in relation to a dangerous drug, includes manufacturing, selling, giving, administering, transporting, sending, delivering, procuring, supplying or distributing otherwise than under the authority of this Ordinance or any other written law."

Compare this definition with the definition in the Hong Kong's Dangerous Drugs Ordinance, 1968 which by section 2 states:

> " Trafficking in dangerous drugs includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying, or otherwise dealing in or with the dangerous drug, and 'traffic in dangerous drug' shall be construed accordingly..."

We can see that unlike the Hong Kong's provisions, our Ordinance's definition of trafficking do not include importing and exporting. Does it mean that the legislature is of the view that importing or exporting dangerous drug is less serious an offence in that it does not attract the death penalty or life imprisonment? It is submitted, however, that the wide definition provided by section 2 of our Ordinance could cover both importation and exportation of dangerous drugs. Both these acts could come within the words "transporting", "sending", or "delivering". These words each cover a part of the concepts of importing and exporting. The prosecution would therefore need only to adduce evidence covering any of these aspects in order to bring an accused's acts within the definition of "trafficking". This would make the accused liable to be charged under section 39B of the Ordinance. Prosecution is made even easier by the fact that the wordings of section 39B(1) indicates an absolute prohibitation and therefore no evidence of mens rea is required in order for there to be a conviction.[56]

We can see, thus, with the incorporation of section 39B into the Dangerous Drugs Ordinance, 1952, an accused person may either be charged for an offence coming under the definition

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56. See: Lim Eng Soon v P.P. [1953] MLJ 166.

of "trafficking" and carrying the death or life imprisonment sentence, or he may be charged under any other relevant provisions carrying a lesser sentence. For example, an accused person may instead of being charged under section 39B, be charged under section 9(1)(c) if the subject matter is prepared opium. There is a danger here of abuse through irresponsible prosecution. Hiterto, there has been no person yet being punished with life imprisonment sentence or the death penalty under this particular section but there 15 cases of major peddlars and smugglers charged under this section pending.[57]

(b) Importing or exporting dangerous drugs.

"Import" is defined by section 2 of the Ordinance which provides:

> "Import", with its grammatical variations and cognate expressions, in relation to West Malaysia, means to bring, or to cause to be brought into West Malaysia by land, air or water, otherwise that in transit;"

The offence of importing dangerous drugs are provided by section 4 in Part II in relation to raw opium, coca leaves,

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57. The New Straits Times, 15, July 1976.

poppy-straw or cannabis, section 9(1)(a) in Part III in relation to prepared opium, section 12(1)(a) for other drugs,[58] in Part IV.

Export is defined by section 2 of the Ordinance which provides:

> "Export", with its grammatical variations and cognate expressions, in relation to West Malaysia, means to take or cause to be taken out of West Malaysia by land, air or water, otherwise than in transit."

The offence of exporting drugs is provided by section 5 in relation to raw opium, coca leaves, poppy-straws or cannabis, section 9(1)(a) in Part III in relation to prepared opium and section 12(1)(b) in Part IV in relation to other drugs.

"Export" within the Opium and Chandu Procalamation, 1946[59] was judicially considered in the case of P.P. v. Lee Tuah Suan.[60] In that case, the appellant was convicted for being the owner of a vessel used for the exportation of opium, an offence punishable under section 9(1) of the Proclamation. The facts were that the vessel proceeded down the Malacca River bound for a foreign port and on being stopped by customs examination station at the mouth of the

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58. See: Section 11 of the Ordinance.

59. (No. 49 of 1946).

60. [1948] 14 MLJ 55.

river was found to have on board a quatity of opium concealed under sacks. The owner was not on board the vessel.

Counsel for the appellant contended that section 9 of the Proclamation under which he was charged only made the owner of the vessel liable where the vessel has been used for the actual exportation, and although an attempt to export is an offence, the Proclamation does not provide that the owner shall be deemed to have committed an offence if the vessel is used by someone else for such an attempt. It was also argued that since section 9 imposes a criminal liability on a person who may have no actual knowledge of the offence for which he is to be punished, the section is one which, on principle, should be construed strictly in favour of such a person. Counsel for the appellant also referred to the Transfer of Powers and Interpretation Ordinance, Section 15 of which provides:

> "Export" with its grammatical variations and cognate expressions shall mean "to take or cause to be taken out of the Malay Peninsula by land, sea or air."

This definition was accepted on appeal by Taylor, J. who declared:

> " ... As a matter of ordinary English usage I am inclined to think that 'Export' would be held to mean the act of carrying of the country and that at any rate once the ship had

> cleared and it was no longer possible for the shipper of goods in the ship to stop them, the shipper would be said to have exported the goods. But in my view, the statutory definition of export and exportation which applies to this Proclamation is narrower than the ordinary meaning of the word ..." 61

The appeal was therefore allowed and conviction quashed since only an attempted exportation had taken place and the Proclamation does not provide that an owner shall be deemed to have committed an offence if the vessel is used by someone else.

The definition of "export" in section 15 of the Transfer of Powers and Interpretation Ordinance was incorporated in section 2 of the Dangerous Drugs Ordinance, 1952. When the Chandu and Opium Proaclamation was repealed by the Dangerous Drugs Ordinance, the word "owner" was excluded from all the provisions relating to exportation and importation of Dangerous Drugs. In the Dangerous Drugs Ordinance, it was substituted with "any person" or "no person". This would be more appropriate. Perhaps the reason for making the owner of the boat liable for the exportation of opium under the Proclamation was to attach liability to

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61. [1948] 14 MLJ 55, at page 55.

persons who employ their servants or agents to do their exporting.

Under the Dangerous Drugs Ordinance, it is submitted that the word "person" is wider in that it would cover such a person if it could be proved that he did in fact employ servants or agents to commit the offence. In this, the prosecution is assisted by section 33 of the Ordinance which make it an offence for any person to abet, attempt or do any act preparatory to or in furtherance of any offence under the Ordinance.

(c) Responsibility for Use of Premises.

Provisions relating to responsibility for use of premises are found in section 10 of Part III and section 13 in Part IV of the Dangerous Drugs Ordinance, 1952. In this respect, we also have to note the presumptions in section 37(b) and (g) which provides:

> " (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises; " and
>
> " (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, unless the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises. "

We have here to determine the meaning of the word "occupier". There is no definition of occupier in section 2 of the Ordinance. We have therefore to look at decided cases. In Ong Eng Soo & 2 Ors. v. P.P.,[62] customs officers having broken down the locked front door of a house, went to a room inside it. As they approached the room, the appellant emerged and on entering it they found a number of other persons engaged in preparing chandu. On these facts, the learned President convicted the appellant. In the course of his judgement, the learned President said that he considered all persons who were found in a room at a time when a raid is made to be occupiers.for the purposes of section 3(2) of the Opium and Chandu Procalamtion, 1946. That section reads:

> " (2) Any opium or chandu which is found on any part of any premises, shall be deemed, unless the contrary is proved, to be in the possession of the occupier of such part of the premises."

The Learned President held that the appellant had not discharged the onus thereby put upon him. The appellant appealed and the main ground of contention was that the learned President erred in law in the interpretation which he had given to the word "occupier."

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62. [1949] MLJ 231.

On appeal, it was argued for the appellant that the word "occupier" in section 3(2) of the Proclamation meant a person who was in legal occupation of or lived in the premises in question. The prosecution argued that all persons found in a room at the time when the raid was made are occupiers for the purposes of section 3(2) and that as used in that section, the term "occupier" is sufficiently wide to include not only a tenant but also a licensee or even a trespasser.

The court held:

> " In section 3(2), however, the word "occupier" stands alone, and I am of the opinion that in this particular subsection of the Proclamation 'occupier' must mean anyone who is found in any part of the premises from which other persons are excluded. I do not think it can be meant only to include persons who necessarily reside on the premises or that part of the premises or who have control in running the premises or that particular part of the premises. I therefore think in this case where the appellants were discovered in a close room in a closed house, out of which room the first appellant emerged on the entrance of the customs officials at 4.00 a.m., that they are rightly held by the learned President to be occupiers of that room, and that, therefore, as chandu was found in that room, the presumption under section 3(2) arose as against them all." [63]

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63. [1949] MLJ 231 at page 231.

This above decision was narrowly construed by Thompson, J. in Loo Beng v. P.P. [64] who stated:

> " ... In view of the way in which it came before the court, I do not think that Ong Eng Soo's case can be taken as deciding anything more than that physical presence on the premises may amount to occupation of them for the purposes of section 3(2) of the Proclamation and that on the facts of that particular case, the physical presence of the appellants on the premises did amount to occupation." [65]

In Loo Beng v. P.P. the facts were that the appellant had been convicted of possession of chandu, which was found in a room where the appellant and 3 others were found when the premises were raided by customs officers. The appellant on his own admission, either as an individual or as a member of a partnership the appellant paid the rent of a room in which the chandu was found and he kept a safe containing money in it and he visited it from time to time for purposes of trans-acting business. On these facts, Thompson, J. held that the learned President was right in holding that the appellant was an occupier of the room for the presumption in section 3(2) of the Proclamation had arisen against him.

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64. [1950] 16 MLJ 119.

65. Ibid., at page 121.

The question now is how would the presumptions in section 37(b) and (g) of the Dangerous Drug Ordinance, 1952 operate in the light of the two cases above which were decided under the Opium and Chandu Proclamation, 1946. In P.P. v. Lai Ah Bee,[66] facts of which were given earlier, the accused was chared under section 12(2) of the Ordinance. The prosecution contended on appeal that the accused was the occupier of the premises and relied on, inter alia, two presumptions in section 37(b) and (g).

With regard to section 37(b), Chang Min Tat, J. in that case held:

> " ... With every respect, it seems to me that her (accused) mere presence in one of the two rooms of the house without more does not show that she had or appear to have the care or management of the house and the presumption that she was the occupier could not be raised. Evidence was freely available of her address and her relationship, if any, to the other occupants and in particular, the tenant of the house. Such evidence was not called to show what care or management she had and if any presumption has to be drawn, it must be against the prosecution." [67]

His Lordship was of the opinion that even if the accused was presumed to be an occupier, the question would still be

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66. [1974] 2 MLJ 74.

67. Ibid., at page 75. Emphasis added.

whether there was any proof in the prosecution's case to raise the presumption of possession. Section 37(g) only raises a presumption of knowledge of the occupier that the drug was so concealed in the premises. He sated:

> " ... As for section 37(g), even if it is conceded that the tins were concealed in the premises, all that could be raised is the presumption that the occupier knew the concealment of the drug. But it is clear that knowledge by itself is not sufficient to fasten possession on the accused. It is only one of the ingredients of possession ..."

The appeal was therefore dismissed.

In Choo Teck Soon v. P.P.,[68] it was held that a car is not "premises" within section 37(g) of the Ordinance. It is interesting to note that in the definition of "premises" in section 2 of the Ordinance, "conveyance" is clearly included. Conveyance is defined in the same section as:

> "Conveyance" includes ship, train, vehicle, aircraft, or any other means of transport by which persons or goods can be carried."

It is therefore submitted for the reasons above that this decision cannot stand and that the presumption in section 37(g) has a wider application in that "premises" includes conveyance.

It therefore appear that the presumptions in section 37(b) and (g) of the Dangerous Drugs Ordinance is narrower than

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68. [1954] 20 MLJ 63

that contained in section 3(2) of the Opium and Chandu Proclamation. Under section 37(b) of the Ordinance, the prosecution in order to invoke it has to prove that the accused have the " ... care and management of such premises ..." and where section 37(g) operates, the prosecution would still have to prove the other necessary ingredients of "possession". This is because the presumption in section 3(2) of the Proclamation was one of possession, which if unrebutted, would convict the accused. However, the presumption in section 37(g) of the Dangerous Drugs Ordinance is one of knowledge only, which is one of the ingredients of the offence of possession.

(d) Cultivation.

Section 6B which was recently incorporated into the Dangerous Drug Ordinance, 1952 [69] prohibits the cultivation of any plant from which raw opium, coca leaves, poppy-straw or cannabis may be obtained except authorised by the Minister. Before this, such an offence would come and could still come under regulation 3(1) of the Dangerous Drugs Regulations, 1952. Under the Dangerous Drugs Regulations, the offence carries a maximum penalty of a fine of $10,000 or an imprisonment for a term not exceeding 4 years or both such fine or

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69. By the Dangerous Drugs (Amendment) Act, 1976 (Act A330/76).

imprisonment. However, by section 6B of the Ordinance, such an offence carries a mandatory sentence of life imprisonment plus whipping of not less than 6 strokes on conviction.

The presumption in subsection (4) of section 6B deems any person found on such land, or who occupies such land or any person found in possession of any receptacle to be the person who planted or cultivated such plant, unless the contrary is proved. This is a heavy burden on the accused but it is necessary ih view of the seriousness of the offence and nature of the offence.

(e) Manufacture of dangerous drugs.

The offence of manufacturing appears only in section 9(1) of Part III of the Dangerous Drug Ordinance, 1952. This is only in relation to prepared opium, cannabis, cannabis resin and substances of which such resin forms the base. Manufacturing is not made an offence in Part IV of the Ordinance which deals generally with refined drugs.[70] This is highly unsatisfactory because these drugs are more potent. Furthermore, the manufacturing of these drugs is not beyond the knowledge or ability of Malaysians because a clandestine laboratory manufacturing heroin was discovered

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70. See: Section 11(1) of the Dangerous Drugs Ordinance, 1952.

by law enforcement agencies at Bukit Mertajam in October, 1973. [71]

The only reference to manufacturing in Part IV of the Ordinance is found in section 16(1) which enpowers the Minister to make regulations for controlling the manufacture of such drugs. Such a regulation can be found in regulation 4 of the Dangerous Drugs Regulations, 1952. However, this regulation is mainly to regulate the manufacture of drugs by licenced or authorised persons. The manufacture of dangerous drugs such as heroin, morphine, etc. were not envisaged by the legislators when this Dangerous Drugs Regulations was made in 1952.

It is therefore recommended that a provision prohibiting the manufacture of dangerous drugs be incorporated in Part IV of the Ordinance without delay.

(f) Other statutory provisions.

Some control is provided by the Poisons Ordinance,1952, [72] which is designed not so much as a penal deterrent against drug abuse but rather as a regulatory regime for manufacture,

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71. Information given by the Royal Malaysian Customs & Excise Headquarters.

72. (No. 29 of 1952)

distribution, retail and wholesale and medical prescription. However, this Ordinance do have a limited prohibiting role. It prohibits the importation and subsequent distribution, whether by wholesale or by retail, unless this is done by a license providing the necessary authority to do so. It is interesting to note that the poisons are graded into varying strengths and the stringency of the Ordinance vary accordingly. [73]

From the drug abuse point of view, no drugs should be obtained without a doctor's prescription. [74] The most serious offence appears to be the making of false entries in the prescribed documents for which the maximum penalty is $3,000/- fine and/or 1 year imprisonment. This is provided by section 27(1) of the Ordinance. The general penalty where no specific penalty is prescribed is $1,000/- fine or 6 months imprisonment with a proviso that if the commission of the offence involved wilful default or culpable negligence, then, the fine should be a maximum of $3,000/- and/or 1 year maximum imprisonment.

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73. See: The Poisons List of the Poisions Ordinance, 1952

74. Section 6 of the Poisons Ordinance, 1952.

It is interesting to note that whereas all drugs and narcotic substitutes listed in the First Schedule of the Dangerous Drugs Ordinance, 1952 are included in the Poisons List of the Poisons Ordinance, 1952, the reverse does not necessarily apply. Examples of such drugs not included in the First Schedule of the Dangerous Drugs Ordinance are methaqualone (the hypnotic substance in mandrax pills), barbitucates, bromides and even the notorious L.S.D. and other hallucinogens. This has a peculiar effect in that the possession and administration of certain drugs could only be prosecuted under the Poisons Ordinance with its considerably lighter maximum penalties instead of under the Dangerous Drugs Ordinance. In this respect, the First Schedule of the Dangerous Drugs Ordinance needs to be revised and updated immediately. The Dangerous Drugs Ordinance should be one step ahead of the drug problem instead of trailing behind it.

Other Ordinances include the Sale of Food and Drugs Ordinance, 1952 which by section 11 makes it an offence for any person selling food adulterated with drugs. Also section 37 of the Road Traffic Ordinance, 1958 makes it an offence for any person to drive or attempt to drive a motor vehicle under the influence of drugs. Section 38 of the same

Ordinance makes it an offence for any person being in charge of a motor vehicle whilst under the influence of drugs. Lastly, some sections of the Penal Code (F.M.S. Cap. 45), for example, section 85(iii) which deals with the effect of intoxication produced by narcotics or drugs and section 90 which deal with the adulteration of drugs and section 285 which covers negligent conduct with poison may come into the picture marginally.